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Supreme Court, U.S.
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No. 95-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RONALD COULTER and ANISSA COULTER, et al.,

Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

Petition For a Writ of Certiorari To The
U.S. Court of Appeal for the 11th Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COUR

Area Code 202
479-3011

August 2, 1996

Mr. Kenneth W. Behrend
2400 Grant Building
Pittsburgh, PA 15219

Re: Ronald Coulter and Anissa Coulter, et al.
v. Metropolitan Life Insurance
Company, Inc., et al.
Application No. A-77

Dear Mr. Behrend:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on August 2, 1996, extended the time to and including September 12, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By /s/
Melissa A. Blalock
Assistant Clerk

GRILLI v. METROPOLITAN LIFE INS. CO., INC.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al.; Ronald Coulter; Anissa Coulter,
Appellants,

Sherry Horton, et al., Plaintiffs-
Appellees,

v.

METROPOLITAN LIVE INSURANCE COMPANY, INC., Rick Urso,
Defendants,

W. R. Cunningham, et al., Claimants.
Nos. 94-3328 and 94-3468 to 94-3470.

United States Court of Appeals,
Eleventh Circuit.

July 31, 1996.

Appeal from the United States District Court for the Middle District of Florida (No. 93-1849-Civ-T-23A), Steven D. Merryday, Judge.

Before TJOFLAT, Chief Judge, and RONEY and CAMPBELL,* Senior Circuit Judges.

BY THE COURT:

Appellees' motion to clarify opinion is GRANTED. This court's opinion is hereby clarified by inserting the following sentence between the second and third sentences of the last paragraph of the opinion: "These attorney's fees and double costs shall be paid by the appellants. Their liability for such fees and double costs shall be joint and several." The opinion shall remain otherwise unchanged.

*Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

GRILLI v. METROPOLITAN LIFE INS. CO., INC.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al.; Ronald Coulter; Anissa Coulter,
Appellants,

Sherry Horton, et al., Plaintiffs-Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC.; Rick Urso,
Defendants,

W.R. Cunningham, et al., Claimants.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al., Intervenors,

Douglas Connor; Roena Connor; Ronald Coulter; Anissa Coulter; Darrin Johns; Joann Kablach; Eric Maharg; Terrance McConnell; Deborah Myers; Terry Palmer; Marjorie Palmer; Brian Rohm; James Romano; Mary Romano; Albert Darren Wise; Jeanne Yokel, Appellants,

Sherry Horton, et al., Plaintiffs-Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC.; Rick Urso,

Defendants-Appellees,

W.R. Cunningham, et al., Claimants.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al., Intervenors,

Edward Beliunas; Paulette Beliunas; John Brooks; Stephanie Charles; Shelly A. Daughenbaugh; Jerilyn Freiwald; Nina Heathcote; Daniel Heathcote; Robert W. Hemcher; Kenneth D. Johnson; Michele R. Johnson; Frieda E. Kamel; Jerome J. Knorr; Enod S. Knorr; George Liptak; Ruth Liptak; Kenneth J. Magnes; Sandra Marie McCue; Mark A. Ondrusek; Ernestine Peterson; Rori K. Rasel; Clarence Ridgeway; Emily N. Riehl; Joan C. Velenta; Robert Dale Wiles; Catherine Wiles, Appellants,

Sherry Horton, et al., Plaintiffs-Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC.; Rick Urso, Defendants-Appellees,

W.R. Cunningham, et al., Claimants.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al., Intervenors,

Ronald Coulter; Anissa Coulter,
Appellants,

Sherry Horton, et al., Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., Defendant-Appellee,

Rick Urso, Defendant,

W.R. Cunningham, et al., Claimants.

Nos. 94-3328, 94-3468, 94-3469 and 94-3470.

United States Court of Appeals,
Eleventh Circuit.

April 2, 1996.

In class action litigation against life insurer, certain class members appealed from orders of the United States District Court for the Middle District of Florida, No. 93-1849-Civ-T-23A, Steven D. Merryday, J. The Court of Appeals held that: (1) denial of intervention as of right or permissive intervention was not erroneous; (2) refusal to allow movants to opt out of settlement class after deadline was not error; (3) order referring matter to special master was not appealable; (4) assuming that dismissal without prejudice of motion to declare movant not member of settlement class was appealable, court acted within its inherent power; (5) movants did not have standing to seek injunctive relief based on defendant's alleged improper communications with other potential class members; and (6) appeal was frivolous, entitling appellees to double costs and reasonable attorneys fees.

Ordered accordingly.

1. Federal Courts 555

Court of Appeals has provisional jurisdiction to review denial of motion to intervene, although ordinarily not appealable final order, under Eleventh Circuit's "anomalous rule"; if Court concludes district court's order was properly granted, its jurisdiction evaporates because ruling is not final order: if Court finds district court erred, however, Court retains jurisdiction and reverses ruling.

2. Federal Civil Procedure 182.5, 340

Refusal in class action suit against life insurer to allow either intervention as of right or permissive intervention to insureds who had instituted separate suit against same insurer in different forum, or to allow them to represent all residents of that forum in suit, was not erroneous where no court had appointed proposed intervenors as representatives of any class of purchasers of insurer's products, nor had any court appointed their attorney to represent anyone with claim against insurer.

3. Federal Civil Procedure 180

Refusal in class action suit to allow class members to "opt out" of class after deadline was not error; movants failed to meet "excusable neglect" standard for opting out after deadline where their failure to act earlier was result of tactical decision. Fed.Rules Civ.Proc.Rule 6(b)(2), 28 U.S.C.A.

4. Federal Courts 585.1

Order referring matter to special master is not final appealable order. 28 U.S.C.A. § 1291.

5. Federal Courts 554.1

Portion of order in class action suit providing for resolution of class-status issues by special master was not appealable; movants had sought determination of whether certain persons were members of settlement class. 28 U.S.C.A. § 1291.

6. Federal Courts 589

Dismissal without prejudice may be treated as appealable final order.

7. Federal Courts 587

Class action court's denial of motion that court declare that movant was not member of settlement class was not final appealable order where motion was denied without prejudice and court anticipated further proceedings with respect to issues raised through reference to special master for resolution. 28 U.S.C.A. § 1291.

8. Compromise and Settlement 67
Federal Civil Procedure 1877.1

Denial without prejudice of motion that court declare movant not to be member of settlement class was reasonable, especially when coupled with reference of class-status issue to special master and was within court's inherent power to fashion efficient and economic solutions.

9. Federal Civil Procedure 2825
Injunction 114(2)

Class members did not have standing to seek injunctive relief, remedial measures, and sanctions based on defendant's alleged improper communications with potential class members where movants were not affected by alleged misconduct and could

not speak for anyone else.

10. Federal Civil Procedure 2840

Appeals from orders denying intervention in class action suit, denying class members request to opt out after deadline, denying without prejudice motion to declare movants not members of settlement class, and denying injunctive relief and remedial measures for alleged improper communications that did not affect moving class members, were frivolous and would result in award of double costs and reasonable attorneys fees to appellees. F.R.A.P.Rule 38, 28 U.S.C.A.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, and RONEY and CAMPBELL *, Senior Circuit Judges.

*Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

PER CURIAM:

Before us for review in these consolidated appeals are orders entered by the district court in a class action suit brought on November 1, 1993, by Sherry Horton and others ("Horton") against Metropolitan Life Insurance Company ("MetLife"). Among other things, these orders denied motions of two class members to intervene in the case, to have their attorney appointed as co-counsel for the class, and to extend the deadline for opting out of the class. We conclude that appellants' challenges to these orders are meritless. The orders were necessary to the efficient disposition of the case, and the district court can hardly be faulted for entering them.

I.

Horton brought this lawsuit in the United States District Court for the Middle District of Florida, to recover, under the federal RICO statute,[1] damages that she and the members of her class allegedly suffered at the hands of MetLife agents who sold them whole life insurance policies on the alleged misrepresentation that they were retirement and/or savings plans. These sales took place in several locations, including Pittsburgh, Pennsylvania, and Tampa, Florida.

On March 25, 1994, approximately four months after Horton brought her suit, Ronald and Anissa Coulter ("the Coulters"), represented by attorney Kenneth W. Behrend of Pittsburgh, sued MetLife in state court in Pittsburgh. They sought recovery for themselves and the members of the Horton class who were residents of Pennsylvania.[2] A class has not been certified in that case,[3] accordingly, at the present time, the Coulters are

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1994) (as added by the Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 901(a), 84 Stat. 922, 941-47). Horton also sought recovery under several other theories of liability, including common law fraud.

[2] They also sought recovery for themselves and others who had purchased MetLife products not formally approved by the Pennsylvania insurance commissioner. The Coulters alleged that, in selling the products described in their complaint, MetLife violated several federal and state laws.

[3] That is, as of the date of the oral argument of these appeals, December 5, 1995, a class had not been certified in the Pennsylvania case.

proceeding in that case alone.

On April 7, 1994, Horton and MetLife reached a settlement agreement. On April 22, the district court certified a settlement class, appointed class counsel, preliminarily approved the proposed settlement and the class notice, and scheduled a fairness hearing for July 18, 1994. In accordance with the settlement agreement, thecourt ordered that any who wished to be excluded from the class opt out by June 13. The court set the same deadline for the filing of claim forms, which accompanied the class notice.

On May 30, 1994, the Coulters, through Behrend, moved the district court for leave to intervene as plaintiffs in Horton. They represented that their claims were "atypical of those in the Horton class." The Coulters' motion requested that the court sever all Pennsylvania residents from the settlement class so that the Coulters could seek to represent them in the suit they had brought in Pittsburgh. Alternatively, the Coulters asked the court to allow their attorney, Behrend, to represent the members of the Horton class from Pennsylvania. In moving the court to intervene, the Coulters did not present the court with a proposed complaint for filing in the case. In fact, at no time have they sought to litigate a claim independently and apart from the Horton class in that case.

The fairness hearing was held as scheduled on July 18, 1994. The district court heard the objections of the Coulters and others to the proposed settlement and to the adequacy of the notice that had been sent to the class. The court also heard argument on the Coulters' motion to intervene. The court denied their motion in an oral ruling from the bench. The court reduced its ruling to a written order on October 25, 1994.[4]

In that order, the court stated that even though the Coulters,

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Comprehensive finds of fact and ocnclusions of law accompanied the order.

as class members, had a legally protectable interest in the action, they were not entitled to intervene as of right under Rule 24. See Fed.R.Civ.P. 24(a). They could protect their interest either by opting out of the class and litigating separately, or by remaining in the case (where, in the court's view, they were being adequately represented by the plaintiffs' attorneys) and, if they thought the proposed settlement was unfair, by objecting to it. Turning to the Coulters' alternative request that they be granted permissive intervention under Rule 24(b), the court observed that the procedures for objecting to the settlement or opting out of the class already offered the Coulters all the relief they were seeking for themselves and the Pennsylvania members of the settlement class.[5] The Coulters appealed the court's rulings in appeal No. 94-3328. The court approved the proposed settlement on the same day it issued a written order denying the Coulters intervention.[6]

After the district court announced from the bench at the July 18 hearing that it was denying the Coulters' motion for leave to intervene, Behrend asked the court to exclude the Coulters from the settlement class even though the June 13 deadline for opting out had passed.[7] Other parties who let the deadline pass sought the

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5 At the same time, the court stated that the Coulters appeared to lack standing to represent the Pennsylvania members of the Horton class on any issue. The Pittsburgh court had not certified a class, had not declared them class members, and had not approved their attorney's representation of any class.

6 The court's approval of the settlement is not an issue in these appeals.

7 The Coulters repeated this request in a written application filed on September 21, 1994.

same relief. The district court denied these requests because (1) none of the movants had established excusable neglect under Federal Rule of Civil Procedure 6(b)(2) for failing to move for an extension of the deadline prior to the deadline date, (2) allowing the requested opt-outs would severely prejudice MetLife's rights under the settlement agreement, and (3) the movants would suffer little, if any, prejudice by remaining in the class, since MetLife would permit them to file late proofs of claim and to participate in the settlement and obtain full restitution. The Coulters and the other late movants appeal this ruling in appeal No. 94-3468.

On October 4, 1994, the Coulters, again through Behrend, filed a "Petition for Injunctive Relief Pursuant to F.R.C.P. 23(d) for Restraint of Improper Contacts in Violation of Local Rule 4.04, and for Sanctions." The petition alleged that two MetLife sales representatives had engaged in improper communications with certain potential class members and that MetLife and/or its counsel were permitting the company to sabotage the class notice. The Coulters asked the court for permission to conduct discovery, to require the issuance of a new class notice, to appoint their attorney, Behrend, as co-counsel for the class, and to award attorney's fees.

Both MetLife and the Horton plaintiffs opposed the motion. Noting the absence of any evidentiary support for the Coulters' petition, the district court concluded that the petition "appears to have been filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney." The court found the petition "unworthy of additional consideration, and because the Coulters and their attorney have consumed already an enormous amount of the parties' and the Court's resources," their request for relief was

denied.[8] The Coulters appeal this ruling in No. 94-3470.

Meanwhile, on September 21, 1994, Edward Beliunas and others ("Beliunas"), who were also represented by Behrend, moved the court to declare that they were not members of the settlement class. The motion was based essentially on counsel's assertion that Beliunas had not received notice of the lawsuit. At the same time, however, the motion seemed to question whether Beliunas had purchased the sort of MetLife product that was involved in Horton and thus whether Beliunas should have been notified at all.

Because the question of whether a policy holder is a class member is a fact-specific inquiry determined on a case-by-case basis, the district court denied Beliunas' motion without prejudice and appointed a special master. The court directed that any of the Beliunas movants who wished to obtain a determination as to whether he or she was a member of the settlement class should petition the special master for such determination. The court set November 22, 1994 as the deadline for filing such petitions. In appointing a special master for this purpose, the court noted that the settlement agreement contemplated the use of a special master to resolve the disputed claims of individual class members. None of the Beliunas movants accepted the court's invitation to petition the special master, however. Instead, all appealed, in appeal No. 94-3469.

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[8] In rejecting the Coulters' petition, the court, sua sponte, admonish[ed] the Coulters and their attorney . . . [to] remain mindful of the provisions of [Federal Rule of Civil Procedure] 11. Rule 11 precludes the filing of superfluous motions for the purposes of wasting valuable resources, perpetuating undue delay, and serving illegitimate self-interests. If applied to the papers filed by the Coulters and their attorney, Rule 11 might well trigger relief markedly different in both effect and object from that which they proposed or contemplated.

II.

These appeals raise several issues. We address only four of them, because they are dispositive. These issues, and our resolution thereof, are as follows.

(1) Whether, in No. 94-3328, the district court (a) erred in denying the Coulters' motion for leave to intervene in the action as a matter of right for the purpose of representing their interests and those of the Pennsylvania members of the settlement class, or (b) abused its discretion in denying the Coulters permissive intervention.

[1] Though a denial of a motion to intervene is generally not considered an appealable final order, we have provisional jurisdiction to review such an order under the Eleventh Circuit's "anomalous rule." EEOC v. Eastern Airlines, Inc., 736 F.2d 635,637 (11th Cir.1984). If we conclude the district court's order was properly granted, our jurisdiction evaporates because the ruling is not a final order. If we find the district court erred, however, we retain jurisdiction and reverse the ruling. Id.

[2] We find no error or abuse of discretion in the ruling. At the time the district court ruled, neither the Pittsburgh court presiding over the Coulters' suit against MetLife, or any other court, had appointed the Coulters as the representatives of any class of purchasers of MetLife products. Moreover, no court had appointed Behrend to represent anyone with a claim against MetLife. We therefore cannot conclude that the district court's denial of intervention was erroneous.

[3] (2) Whether, in No. 94-3468, the district court abused its discretion in denying the requests of the Coulters and others to opt out of the settlement class after the June 13, 1994, deadline had expired.

Because the Coulters made a tactical decision not to opt out in time, and the other movants failed to meet the "Excusable

neglect" standard of Rule 6(b)(2), we see no reason for permitting an opt-out after the expiration of the deadline. Accordingly, we find no abuse of discretion by the district court.

(3) Whether, in No. 94-3469, the district court's order (a) denying without prejudice Beliunas' motion that the court declare that Beliunas was not a member of the settlement class and (b) referring that class-status issue to a special master, is an appealable order and, if so, whether the court's action constituted an abuse of discretion.

[4,5] An order referring a matter to a special master is not a final order appealable under 28 U.S.C. § 1291 because it does not terminate the appellant's claim. See Deckert v. Independence Shares Corp., 311 U.S. 282, 290-91 & n. 4, 61 S.Ct. 229, 234 & n. 4, 85 L.Ed. 189 (1940) (order referring issue to master is

interlocutory and not appealable); Turner v. Secretary of Air Force, 944 F.2d 804, 806 n. 1 (11th Cir.1991) (noting that court had found order of reference to special master non-final). We hold, therefore, that the portion of the challenged order providing for the resolution of class-status issues to a special master is not appealable; we therefore do not review it.

[6, 7] A dismissal without prejudice may be treated as an appealable final order. See Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1326-27 n. 1 (11th Cir.1983). We do not believe, however, that we have a final order before us. The district court denied a motion without prejudice; it did not dismiss a complaint. In short, it was an interlocutory order. Moreover, the court anticipated further proceedings with respect to the issues raised, and provided a means for Belunias and others to have their class status reviewed.

[8] Assuming for the sake of argument that the disposition is appealable, we conclude that the court's action was entirely reasonable, especially when coupled with the reference to the special master. The court simply drew on its inherent power to fashion an efficient and economic solution to the problem the movants presented. Clearly, there was no abuse of discretion.[9]

[9] (4) Whether, in No. 94-3470, the district court abused its discretion in denying the Coulters' motion for injunctive relief, remedial measures, and sanctions based on MetLife's allegedly improper communications with potential class members.

We affirm the district court on this issue because the Coulters lacked standing to seek the requested relief. They themselves were not affected by the alleged misconduct, and they could not speak for anyone else. Even if we were to assume that they had standing, the district court did not abuse its discretion in

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We note in passing that none of the movants objected to the reference to the special master or requested the court to fashion an alternative method for addressing their concerns.

denying the requested relief because the Coulters failed to demonstrate that the alleged misconduct occurred.

III.

[10] These appeals not only lack merit, they are frivolous. We therefore exercise our discretion to award the appellees double costs and reasonable attorney's fees. Those fees shall be determined with respect to each appellant and appellee by the district court following the receipt of our mandate. See Fed.R.App.P. 38; Pelletier v. Zweifel, 921 F.2d 1465, 1523 (11th Cir.), cert. denied, 502 U.S. 855, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991).

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Nos. 94-3328, 94-3468, 94-3469, 94-3470

SHERRY HORTON, et al.,

Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee,

Ronald and Anissa Coulter, et al.,

Appellants.

Consolidated Appeals from final Order entered
October 25, 1994, in the District Court for the
Middle District of Florida
Civil Action No. 93-1849-CIV-T-23A

SECOND PETITION FOR REHEARING

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August 1, 1996

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SECOND PETITION FOR REHEARING

AND NOW comes the Petitioners, Ronald Coulter and Anissa Coulter and the other Appellants, by their attorneys, Kenneth W. Behrend and the law firm of Behrend and Ernsberger, and bring this Petition because of the decision and the ratio decidendi of BMW of North America v Gore, 116 S. Ct. 1589 (1996) (which was decided on May 20, 1996, twenty-one days after our case was decided) and the decision and the ratio decidendi of Georgine v Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) Georgine decided on June 28, 1996. These dates are after the date of decision of your Honorable Court which was on April 2, 1996 and after the denial for the Petition For Rehearing which was May 15, 1996. These two cases have significant persuasion and authority to which obeisance should be given. The persuasion and authority of these cases were overlooked as they were not decided in time for your consideration. Had they been given consideration, the results probably would have been different in this case.

I. THERE IS A PUBLIC POLICY TO DEFER TO THE STATES IN MATTERS OF INSURANCE REGULATION

The Congress of the United States has passed the McCarran-Ferguson Act, 59 Stat. 34, which specifically prohibits the regulation of the business of insurance by the federal government, and has specifically legislated that the regulation of insurance lies specifically within the province of the individual states.

The plain reading of the McCarran-Ferguson Act, clearly demonstrates that Congress wants the regulation of the business of insurance to take place in the States, by the States and not by the federal government, or the federal courts. It may be said that there is public policy opposed to federal regulation or interference in the business of insurance. Regulation is left exclusively to the states.

The Supreme Court of the United States has directed caution and forbearance in general by a federal court, before overriding state law and state concerns. In viewing the scope of federal regulation versus state regulation, the Supreme Court of

the United States has found in Gregory v. Ashcroft, infra that:

> ... "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. Atascadero, supra, at 243. We explained recently: "If Congress intends to alter the usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984)..... This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 111 S.Ct. 2395, 501 U.S. 452 at 452 (S.Ct. 1991).

Congress has specifically restricted the federal government's, and the federal court's, power to regulate the business of insurance, via the McCarran-Ferguson Act. It is clear that the intention of Congress and public policy are that the federal government should not regulate the business of insurance. The Horton Court, through the class settlement, is regulating the business of insurance directly to ignoring the McCarran-Ferguson Act. The Horton Court is seeking to regulate all the States and

impose the insurance law of Florida on them.

II. THE INDIVIDUAL STATES HAVE A STRONG RATIONALE TO REGULATE THE FRAUDULENT CONDUCT OF AN INSURANCE COMPANY DOING BUSINESS WITHIN THAT STATE

In Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991), the Supreme Court found that a State has a strong interest to protect its citizens from fraudulent conduct of an employee of an insurance company and the State can protect its citizens through regulation of insurance by an award of both compensatory and punitive damages.

> Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. See British General Ins. Co. v. Simpson Sales Co., 265 Ala. 683, 688, 93 So. 2d 763, 768 (1957).

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, at 14; 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991).

Principles of sovereignty and comity forbid a court from using the laws of an individual state to enact policies for the entire nation, or to impose an individual state's policy choice on neighboring states. BMW v. GORE, 116 S.Ct. 1589 (1996).

The power of the courts to enforce the State's right to regulate any business is limited to the States' authority within the boundaries of that State. The Supreme Court has found in BMW v. Gore, supra, that a State has the authority to regulate the commerce of business within the State, but that is where the States' authority ends. The State cannot regulate the conduct of business beyond the States' boundaries.

The award by a court of compensatory and punitive damages pursuant to state law are a form of State regulation.

> We think it follows from these principles of state sovereignty that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors lawful conduct in other States. ft.nt. 17. 17 State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See New York Times Co. v. Sullivan, 376

U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964)("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959)("regulation can be as effectively exerted through an award of damages as through some form of preventative relief"). BMW v Gore, 116 S.Ct. 1589 (1996).

Based on this finding the Court struck down a punitive damages award aimed at influencing BMW's nationwide policy. The Supreme Court stated:

> ... by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the States' interest in protecting its own consumers and its own economy. BMW v. Gore, 116 S.Ct. 1589 (1996).

Concerns of federalism and judicial restraint counsel that the federal courts should not legislate to the States what form the deterrence should take, i.e. the amount of damages, and should they be only compensatory and not punitive. The Court in Horton by refusing to review the case as if each individual State had a right

to regulate Metropolitan's conduct and by refusing to consider punitive damages, even though numerous states authorize them, essentially took from the States, the ability to regulate the fraudulent sale of insurance within their boundaries.

III. A READING OF GEORGINE V. AMCHEM PRODUCTS, INC., 83 F.3d 610 (3RD CIR. 1996), REQUIRES THAT THE SETTLEMENT CLASS BE DECERTIFIED, OR THAT THE CLASS MEMBERS OF HORTON, OTHER THAN FLORIDA RESIDENTS, BE INCLUDED ONLY IF THEY OPT-IN AND, THEN, THE LAW OF THE STATE OF THEIR RESIDENCE MUST GOVERN THE DISPOSITION OF THEIR CLAIM

Georgine v Amchem Products, Inc., supra, is an asbestos injury case, involving between 250,000 and 2,000,000 individuals. A class action was certified by the District Court and the Court approved a settlement which would extinguish "future claims" of "exposure only" plaintiffs even though they had not accrued.

The order of certification was vacated.

The decision of the United States Court of Appeals for the Third Circuit is in almost complete conflict with the opinion here. The facts of Georgine, supra, and our case are very close to being congruent.

The Third Circuit Court recognized the efforts of an extremely able judge and creative lawyers in crafting a 106 page settlement document. The Court opined:

> "The resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue. "

Georgine, supra, page 617.

However, an alarm was sounded by the Third Circuit Court when it noted:

> ... against the need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system. Senators have complained that the use of class actions to resolve mass toxic torts, particularly those involving future claims, improperly involves the judiciary in the crafting of **legislative** solutions to vexing social problems. These criticisms are not merely abstract; they are levied in terms of the fundamentals of the federal judicial polity; jurisdiction, justiciability, notice and the requirements of Federal Rule of Civil Procedure 23. (Emphasis added).

Georgine, supra, page 617.

> Based on this concern the Court went on to hold:
>
> ... we will vacate the district courts' order certifying the plaintiff class and remand with directions to decertify the class and vacate the injunction. We recognize that our decision undermines the partial solution to the asbestos litigation crisis. However, in doing so, we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks. We thus leave legislative solutions to legislative channels.

Georgine, supra, page 618.

As in Georgine v Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) we are faced with a case that forces "the judicial system to choose between forging a solution to a major ... problem on the one hand, and preserving its institutional values on the other." Our case which is offering to extend itself from the Tampa Bay area of Florida across the continent through efforts of imaginative defense counsel, favorable injunction and a latently ambiguous class action settlement order, involves potentially millions of American families and life insurance policyholders who had faith that life insurance was safe from the manipulative greed and unscrupulous

sales practices of an unscrupulous life insurance company.

By now it is sensible to assume that your Honorable Court has become aware that companies other than the Metropolitan Life Insurance Companies have admitted to sales scams on their policy holders, so enormous in scope that they shock even the most cynical. Because life insurance companies are so exclusively state creatures, no one has an understanding of how the companies can be brought before only one court. Because Metropolitan's agents perpetrated different scams against different groups in different states, the lumping of them together for dispositive class action adjudication, clashes with the fundamentals of the federal judicial polity: jurisdiction, justiciability, notice and the requirements of Federal Rule of Civil Procedure 23.

Judge Merryday created and employed an innovative way to dispose of hundreds of thousands and maybe a million, whole life policyholder claims against Metropolitan Life Insurance Company. The class action settlement and the injunction issued against the policyholders, who had been cheated by the company and its sales agents, could be administered with an economy of

Judicial effort through the direction of the United States District Court for the Middle District of Florida, Tampa Division.

With respect to our case, there are many policyholders all over the United States who do not know they have been taken by a Metropolitan Life Insurance Company scam, and may not know for many years that they have been cheated by Metropolitan. They may not learn of their being cheated until some year in the future when they will get a premium notice, increased, in some multiple amount. Some policyholders will only learn of the deception when they retire and are disappointed when their promised expectations are not met. Others will only realize their injury when some honest financial planner explains that the policy they have is inappropriate for the purposes they were advised to purchase it, or when a tax has to be paid which Metropolitan Life Insurance Company did not disclose at the time of purchase and, undoubtedly, other situations, such as how much money was lost by cashing in a policy to provide a commission for a Metropolitan Insurance Company agent.

Some policyholders have been cheated by being offered a

document that defies adjectival description. However, some policyholders were informed that they could have their money they paid in premiums returned to them, if they could verify in writing that as part of the scam worked on them, they did not know that they were purchasing insurance. Many of these whole life policyholders had taken insurance physical examinations arranged for by Metropolitan Life Insurance Company and knew they were to receive life insurance.

The size of the group of Metropolitan Life Insurance Company policyholders injured during the years of the Florida sales office nurses' retirement scam can only be estimated, Metropolitan Life Insurance has not made a public disclosure. Between a minimum of two hundred thousand and a maximum of a million may have purchased insurance through deception. Most of the estimated policyholders were not even part of the nurses' scam; they were part of other Metropolitan Life Insurance Company scams.

IV. QUESTIONABLE FEDERAL QUESTION JURISDICTION, A QUESTIONABLE OPT-OUT PROVISION AND QUESTIONABLE REPRESENTATION, SHOULD REQUIRE JUDICIAL CAUTION AND FORBEARANCE FROM DECLARING A SETTLEMENT CLASS OR APPROVING AN AMICABLE APPEARING SETTLEMENT AGREEMENT

Federal question jurisdiction in the Horton case was based on suspect grounds, that federal regulation of the business of insurance can be accomplished through the Racketeering Influenced Corrupt Organization Act (RICO), specifically that RICO applies to the business of insurance. On the face of the Horton complaint it was clear that RICO was used to obtain jurisdiction in contradiction to the mandate of Congress in the McCarran-Ferguson Act.

The Horton court should have used judicial restraint, because of the mandate of congress, and should not have exercisedany jurisdiction, because of the mandate of Congress. It was an unnecessary impingement on the individual States' rights to protect their citizens, and the individual States' legitimate interest

in punishment and deterrence.

Instead of using judicial restraint, consideration for State sovereignty and comity, the Horton court through the settlement order, regulated the business of insurance, not only in Florida, but for every state in the country. The Horton court found that settlement proposal in the Horton action, which only provided for compensatory damages, to be "fair" for every State, and it made no inquiry into the laws of each individual state, despite the fact that the settlement would have a preclusive effect on claims filed in these States. Moreover, no punitive damages were considered, regardless of every States' individual interest in the regulation of insurance and the deterrence of fraud.

This second request for a rehearing in this case is occasioned by the fact that, after the class certification by the district court, after the denial of appeals by this Honorable Court, and after a request for rehearing was denied by this Honorable Court, there has been a growing consensus of judicial opinion that class certification must be carried out as if the case were going to be litigated, and without taking the settlement into account. See

Georgine v. Amchem, id. at 617, 618.

As the Third Circuit noted in Georgine:

> We now hold that because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, and because "[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," id. at 799, the 23(b)(3) criteria must also be applied as if the case were to be litigated. While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.

V. THE CASE AND CONTROVERSY REQUIREMENT OF ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES WAS NOT MET IN OUR CASE

The suit on which the class settlement rests is a feigned suit -- and thus is not a justiciable case or controversy under Article III of the Constitution. To qualify, the plaintiffs and plaintiffs' counsel, had to have the implausible intention of litigating the RICO claim that became the basis of Judge Merryday accepting jurisdiction. The RICO claim asserted was patently not sustainable.

The RICO claim was filed, merely to provide a forum to seek approval of a result that plaintiffs and defendants jointly pursued. This contention is supported by numerous facts. First: no opposition pleading was filed to the RICO claim, which on its face should have been dismissed. Second: no deposition discovery was taken. Third: the length of time the case existed from filing to settlement; the complaint was filed on November 1, 1993, the Second Amended Complaint was on February 14, 1994, (no answer or motion to dismiss was filed), and only two months after amending the complaint, on April 12, 1994, the joint motion to settle was filed. Fourth: the joint motion requesting certification of the proposed settlement class, preliminarily approving proposed settlement, approving notice and setting fairness hearing, needs to be closely reviewed. The attorney's fees and settlement amount were negotiated simultaneously, Counsel for plaintiffs was to be paid $2,750,000 to be paid separately from any settlement fund while the class members could keep their policy, or receive a refund of a few hundred to a few thousand dollars each, said refund was already agreed to by Metropolitan via numerous

agreements with various insurance commissions. Fifth: despite the complexity and enormity of the affect of the settlement upon hundreds of thousand of policyholders due process rights, the fairness hearing was accomplished in one day. Sixth: The standard for class determination and settlement unabashedly was not a litigation standard, but something less stringent, less demanding and more relaxed than a litigation standard.

VI. IT IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT AND THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES THAT THE HORTON CLASS CONTAIN AN OPT-OUT PROVISION, THAT IS CLEAR AND UNEQUIVOCAL BOTH IN LANGUAGE AND OPERATION.

Due process calls for a Constitutional right to opt-out of the class. It is Appellants' assertion that there was not an opt-out provision created for the Horton class settlement that applied to the Appellants. A class action settlement, to comply with the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, must have an opt-out provision.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L.Ed.2d 688, 105 S.Ct. 2965.

Appellants assert that while there was an opt-out provision drafted for the Horton settlement and the creators of the provision, we believe, though that they had molded an opt-out provision, they had not succeeded, it was Constitutionally defective.

As an example, Mr. and Mrs. Coulter first learned that they must act as class members of the Horton class when were told by the District Court, after the Fairness Hearing, and confirmed by the Eleventh Circuit Court of Appeals, that they were in the Horton class.

If the Coulters had received a class notice, (which they deny receiving), they would have read, in the class notice and proof of claim form, that if they understood that they were purchasing life insurance, they did not qualify as class participants for any money distribution.

The opt-out provision had nothing for the Coulters, once they were declared part of the Horton class. The Coulters understood they were buying life insurance and the Court included

them as Horton class members, even though they could not participate in any proceeds of the class settlement.

For the opt-out provision to be worthy of the name, there had to be additional time provided; if for some reason, probably not anticipated by the creators of the provision, it would cause Metropolitan policyholders to be declared part of the class, when they were not entitled to receive any proceeds from the class distribution. The class notice put them into the Horton class settlement, and the qualifications for receiving any distribution (i.e. no knowledge that they were purchasing insurance) prevented sharing in the class distribution.

For the opt-out provision to be anything but unconstitutional there had to be some provision for people, such as the Coulters, to opt-out after a determination was made that they were part of a class and that they could recover nothing from the class settlement.

CONCLUSION

It is respectfully submitted, if the body of judicial opinion exemplified by Georgine v. Amchem Products Inc., supra, were to

be applied to this case, this Honorable Court would remand the case to the district court with instructions to carry out the process of class certification as if the case were going to be litigated and to rigorously apply all the stringent requirements of FRCP Rule 23 relating to class certification. In the alternative, this Honorable Court should declare the Coulters and all who could not verify that they did not know that they were buying insurance from Metropolitan Life Insurance Company, not to be Horton class members.

Respectfully submitted,

BEHREND AND ERNSBERGER

/s/ _____
Kenneth W. Behrend, Attorney for
Ronald and Anissa Coulter

CERTIFICATE OF SERVICE

I, Kenneth W. Behrend, hereby certify that a true and correct copy of the within Second Petition for Rehearing was mailed to the Court this lst day of August, 1996, and to the following by United States mail, first class postage prepaid, addressed as follows:

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BEHREND AND ERNSBERGER

/s/_____
Kenneth W. Behrend

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-3328; 94-3468
94-3469; 94-3470

PETER J. GRILLI,

Special Master,

JULIO GONZALEZ-ROEL, et al.;
RONALD COULTER; ANISSA COULTER,

Appellants,

SHERRY HORTON, et al.,

Plaintiffs-Appellees,

versus

METROPOLITAN LIFE INSURANCE COMPANY,
INC.; RICK URSO,

Defendants,

W. R. CUNNINGHAM, et al.,

Claimants.

On Appeal from the Untied States District Court for the
Middle District of Florida

ORDER:

Appellants' Motion for Leave to File a Second Petition for Rehearing is Denied.

/s/
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Nos. 94-3328, 94-3468, 94 3469, 94-3470

SHERRY HORTON, et al.,

Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY

Defendant-Appellee

Ronald and Anissa Coulter, et al.,

Appellants.

Consolidated Appeals from final order entered
October 25, 1994, in the District Court for the
Middle District of Florida,
Civil Action No. 93-1849-CIV-T-23A

PETITION FOR REHEARING

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April 22, 1996

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Newberg on Class Actions, 3rd Ed 3,4,5,7,9

with respect to the issues of the Coulters, the Beliunas and other putative class members, all citizens of Pennsylvania, being part of the Horton class action settlement class and, if so, opting out. Our argument will be in the alternative. Either a national class action be declared with a subclass for Pennsylvania citizens with protection of the rights they have as citizens of Pennsylvania. In the alternative, we ask that the Coulters, the Belunias, and other putative class members who have made efforts to opt out or have attempted to be declared not part of this action be declared opted out.

To do otherwise is to be in violation of the Tenth Amendment and the due process clauses of the United States Constitution Fifth and Fourteenth Amendments.

Petitioners also respectfully request an opportunity to be heard on the F.R.A.P. 38 sanctions issue: demonstrate Petitioners' petition for intervention and request for injunction were proper and necessary under the circumstances and comported with respected authority. Petitioners also respectfully request an opportunity to remedy the practical procedural problems resulting from the

opinion. It is asked that a hearing be granted to set aside the sanction order under F.R.A.P. 38; that a hearing be held on the creation of a national class action with a subclass of the Horton class called the Coulter class or that the citizens of the State of Pennsylvania who have made themselves known as wishing to be opted out be declared not part of the class.

Respectfully submitted,

BEHREND AND ERNSBERGER

/s/_____
Kenneth W. Behrend
Attorney for Petitioners

IV. APPENDIX

EXCERPTS FROM NEWBERG ON CLASS ACTIONS

1st Edition, **§ 8156i - Class or Individual Intervention in Pending Class actions; Class Intervention in Individual Actions**

"One seeking to intervene must file the appropriate motion, under Rule 24. ..."

"From the plaintiff's lawyer's standpoint, there may be specific strategies that are served in considering whether or not to intervene in a pending class action, and if so, whether to intervene individually or in behalf of a class. ..."

"Where a prospective class plaintiff seeks to intervene, either individually or on behalf of an intervener's class, in pending litigation in which there has not yet been a class ruling, this serves the important purpose of bolstering the adequacy of representation for certifying a class. This same objective of enhancing class certification possibilities, where there may be some doubt concerning how widespread the legal problem is, or whether sufficient persons are involved to justify class treatment, may be

achieved by commencing a new class action in one's home district, paralleling representative litigation already initiated elsewhere. ..."

"Finally, there may be situations where individual actions are pending, and it becomes important to intervene as a class in order to preserve the rights of class members and achieve an advantage already obtained by the pending proceedings. ..."

3rd Edition **§ 7.31 Conflicting or Overlapping Classes**

"When multiple litigation in one or more forums results in the pendency of overlapping or conflicting class actions, the court should take prompt steps to reach an initial class determination. If a plaintiff has filed a class suit in which the putative class sought may be part of an already existing class in another district, the court, after determining that a conflict actually exists, may transfer the case for consolidation, or determine the class on its own. If the court finds that a class is appropriate, and that the conflict may be resolved, it should act to do so by establishing subclasses based on appropriate descriptive characterizations, to protect class members interests and to facilitate management of the action.

Multiple Class Suits before Different Courts

"When cases bearing similar class allegations and similar causes of action are pending in different courts, such as different federal and state courts or different state courts should be kept informed of class certification proceedings relating to the same cause of action, and rarely should the same class be certified on the same cause of action before more than one court, in the absence of special circumstances.

In determining the superiority of certifying a class in a particular forum, the court should compare the advantages of a class suit in the different fora and should weigh considerations of class scope, tolling of statute of limitations for the benefit of the class, reconciliation of pending individual suits with the certification of a class suit without opt-out rights under Rule 23(b)(1) or (2), whether in fact a class suit is pending in another more favorable forum, certification of a class limited to selected issues or claims, the state of litigation progress in the competing suits, and a host of other factors."

§9.48 Resolving Overlapping or Conflicting Class Actions with Subclasses and Other Means

"When multiple litigation has resulted in the pendency of overlapping or conflicting class actions, the court should take steps to reach a reasonably prompt initial class determination. If it finds that a class action is appropriate, it should take appropriate steps to resolve the overlapping or conflicting class actions. Where class members share common issues with respect to the general liability of a defendant but have divergent issues or interests with respect to the impact and damages suffered or relief requested, the establishment of subclasses by the court under Rule 23(c)(4) will facilitate management of the litigation and will preserve maximum protection of the interests of class members. ..."

"... When subclasses are created, they may be formed on the basis of geographical scope, or by any other appropriate descriptive characterization. Alternatively, the court may redefine the class as alleged in the overlapping complaints in order to establish one uniform class for the pending actions."

§16.06 Intervention by Absent Class Members: Introduction

"... However, intervention may be necessary, in a number of situations, to avoid mootness or to assure typicality of claims on behalf of the class. It may also be permitted because "it may be helpful at trial or in formulating relief..., or because it might facilitate a subdivision of the class should subclasses become necessary.

A putative intervenor must satisfy the requirements of Rule 24 before intervening. Limitations may be placed on intervenors. Under Rule 23(d)(2) there is no absolute right to intervene, and the court may deny intervention if it would serve no useful purpose. The court also may deny intervention where the movant has failed to exhaust administrative remedies or when the scope of the action would be broadened."

"... The following sections discuss the purpose and benefits of intervention before and after class certification as well as after a denial of certification, the timeliness of intervention, and the role of intervention in class settlement proceedings."

§16.07 Intervention of Right

"Under Rule 24(a), members of a class have a right to intervene if their interests are not adequately represented by existing parties. For example, inadequacy may result from the existence of intervenor interests common to the class but different from those of the class plaintiff, or from mootness or potential mootness of the named plaintiff's claim. Rule 23 specifically contemplates intervention in class suits, and in certain situations courts may permit intervention even when representation is adequate.

Parties seeking intervention must have an interest in litigation. Intervention pursuant to Rule 24(a)(2) may be denied if disposition of the action cannot as a practical matter impair or impede the intervenors' ability to protect their interests.

Intervention in Rule 23(b)(2) actions by class members may be significant to protect their interest because they cannot opt out of the suit even if they are inadequately represented. Thus, intervention avoids "subsequent collateral attacks on the due process preclusive effect of a judgment...."

Though application for intervention must be timely under Rule 24(a)(2), courts have been more flexible when intervention is of right rather than permissive.

Absent class members may intervene of right to appeal a class certification denial after final judgment. Intervention has also been permitted to parties seeking to set aside a consent decree..."

CERTIFICATE OF SERVICE

I, Kenneth W. Behrend, hereby certify that a true and correct copy of the within Petition For Rehearing was mailed to the Court this 22nd day of April, 1996, and to the following by United States mail, first class postage prepaid, addressed as follows:

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BEHREND AND ERNSBERGER

By: /s/
Kenneth W. Behrend

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-3328; 94-3468
94-3469; 94-3470

PETER J. GRILLI,
Special Master,

JULIO GONZALEZ-ROEL, et al.;
RONALD COULTER; ANISSA COULTER,

Appellants,
SHERRY HORTON, et al.,

Plaintiffs-Appellees,

versus

METROPOLITAN LIFE INSURANCE COMPANY,
INC.; RICK URSO,
Defendants,

W.R. CUNNINGHAM, et al.,
Claimants.

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: TJOFLAT, Chief Judge, RONEY and CAMPBELL*,
Senior Circuit
Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants,

Gonzalez-Roel, et al., is Denied

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

---

*Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the
First Circuit, sitting by designation.
ORD-41

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER GRANTING PERMANENT INJUNCTION

Before the Court is a motion by defendant Metropolitan Life Insurance Company ("MetLife") seeking a permanent injunction under the All-Writs Act, 28 U.S.C. § 1651(a), against Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon, who have filed individual lawsuits against MetLife in Alabama. The motion was fully briefed by all parties and was the subject of a hearing before the Special Master on July 24, 1995. After the hearing, the parties were permitted to make additional submissions.

Based on the foregoing, and on the Court's overall familiarity with the litigation and settlement of this class action,

IT IS HEREBY ORDERED that:

1. Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon (collectively, the "Alabama plaintiffs") are hereby determined to be members of the settlement class previously certified in this action because (1) they purchased their MetLife whole life insurance policies from MetLife's Tampa, Florida sales office between January 1, 1988 and October 31, 1993, or from other MetLife sales offices between January 1, 1990 and October 31, 1993, during the class period, (ii) they bought their policies as retirement and/or other savings plans or vehicles, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, and (iii) they did not timely exclude themselves from the settlement class.

2. This Court previously entered an Order and Final Judgment under Fed. R. Civ. P. 54(b) releasing MetLife and its officers, directors, employees, agents, representatives, and its

predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents and representatives of any or all of them (collectively, "MetLife and its Affiliates"), from any and all claims or cause of action that (i) have been or could have been asserted in this action or (ii) have been, could have been, may be or could be alleged by any settlement class member against MetLife and its Affiliates on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, described or referred to in this action or that are related to sales solicitations described in the Second Amended Complaint in this actior. (the "Sales Solicitations") or the purchase of Whole Life Policies (defined as policies designed by MetLife as Whole Life, Life Paid Up at 95 or Life Paid Up at 98), including without limitation any and all claims for damages, rescission, equitable and legal relief, attorneys' fees, costs or disbursements incurred by any person or entity in

connection with or related in any manner to this action, the settlement thereof, the administration of this settlement, the Sales Solicitations or the purchase of Whole Life Policies; provided, however, that nothing in that prior Order was intended to bar any action to enforce the parties' Settlement Agreement in accordance with its terms.

3. The Court also dismissed all claims of plaintiffs and settlement class members on the merits and with prejudice, and it retained jurisdiction to administer the settlement and enforce its Orders and Judgment.

4. Based on its prior Orders and Judgment, the Court hereby determines that the Alabama plaintiffs' claims have been discharged and dismissed with prejudice and on the merits and that the Court's rulings are res judicata as to those claims.

5. The Alabama plaintiffs and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, are hereby permanently enjoined from pursuing in the Alabama courts, or any forum other than this Court, any claims that were

or could have been raised in this action, and from taking any further action in the Alabama courts other than filing voluntary notices of dismissal of their individual actions on the merits and with prejudice.

6. To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action.

7. MetLife is hereby ordered to abide by its offer to grant the Alabama plaintiffs the opportunity to apply for the same settlement relief provided to eligible settlement class members, i.e., a refund of net premiums plus interest as specified in the Settlement Agreement, or a MetLife Growth Plus Annuity, notwithstanding the expiration of the claim-filing period. If the

Alabama plaintiffs wish to take advantage of this offer, they must file Proof of Claim Forms in substantially the same form as those previously approved by the Court, not later than 30 days from the date of this Order.

8. The injunctions issued in this Order are authorized by the All-Writs Act, 28 U.S.C. § 1651(a), and the Anti-Injunction Act, 28 U.S.C. § 2283, because they are necessary to protect and effectuate this Court's Final Judgment and are necessary in aid of this Court's continuing jurisdiction.

IT IS SO ORDERED in Chambers in Tampa, Hillsborough County, Florida this 8th day of November, 1995.

/s/
Steven D. Merryday
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

VS. CIV. No. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class

settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94).

These motions were briefed, and affidavits were submitted. The Court heard oral argument at the July 18, 1994 hearing on the fairness of the proposed settlement.[1] Upon consideration of the papers submitted and arguments made, the Court denied the intervention motions and determined that Daxon and Urso do not have standing to object to the proposed

---

[1] The former sales managers moved for leave to file a reply brief in support of their motion to intervene, and they tendered a proposed reply brief with the motion. (Docket No. 90.) Leave to file a reply brief is granted; the reply brief has been considered by the Court. In addition, plaintiffs moved to supplement their response to the motion to intervene. (Docket No. 108.) This motion also is granted, as ordered below, and the supplemental material has been considered by the Court.

settlement.[2] In accordance with and in support of the determinations made at the hearing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Factual Background

1. Plaintiffs' central allegation in this case is that they and other members of the settlement class purchased whole life insurance policies issued by Metropolitan Life Insurance Company ("MetLife") as retirement and/or other savings plans or vehicles as a result of written or other sales solicitations that allegedly did not fully disclose that the product being sold was life insurance.

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[2] At the July 18 hearing, counsel for the former sales managers (except Mr. Ferrandes) did not assert their clients, alleged standing to raise their previously filed objections. Instead, counsel spoke only on behalf of Daxon. After the Court's bench ruling on Daxon's lack of standing, however, the parties and the former sales managers stipulated on the record that the former sales managers were not settlement class members.

2. The complaint in this action was filed in November 1993 and was widely publicized in the press, particularly in the Tampa Bay area.

3. In April 1994, plaintiffs and MetLife agreed to a proposed settlement of this action and entered into a Settlement Agreement.

4. On April 22, 1994, this Court issued its Order with respect to Class Certification, Notice, and Settlement Hearing (Docket No. 48), certifying a settlement class consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from
>
> (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or
>
> (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

5. The April 22 Order also approved forms of individual and publication notice and a proof of claim form. The proof of claim form required settlement class members who

sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.)

The Coulters

14. The Coulters are the named plaintiffs in an action originally filed on or about March 25, 1994, in the Court of Common Pleas of Allegheny County, Pennsylvania, but now pending after removal in the United States District Court for the

Western District of Pennsylvania, Civil Action No. 94-0629. (Their complaint is attached as Exhibit 2 to Docket No. 77.)

15. The Coulters' Pennsylvania action asserts, inter alia, claims on behalf of a putative "subclass" of Pennsylvania residents who allegedly were solicited to purchase MetLife whole life insurance policies as savings and/or retirement plans. These allegations are substantially the same as those asserted by plaintiffs in this action.

16. The Coulters did not file a proposed complaint with their intervention motion, as required by P2d. R. Civ. P. 24(c). Instead, they sought to have "all Pennsylvania residents . . . severed [from this action] and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action" against MetLife. Alternatively, the Coulters asked "that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law." (Docket No. 77, at 1-2.)

17. The Coulters have not yet moved for class certification in Pennsylvania. Nor have they sought to have their attorney appointed as class counsel. MetLife has filed a motion

to dismiss the Coulters' amended complaint, and that motion is pending before the federal district court in Pennsylvania.

18. As of June 8, 1994, approximately 800 Pennsylvania settlement class members had filed proofs of claim, even though the deadline for filing was not until June 30, 1994.

19. The Coulters asserted that, in January or February 1993, they purchased a MetLife whole life insurance policy that allegedly had been represented as a retirement or savings plan. (Pennsylvania Complaint ¶ 30-36.) They also claimed they purchased the insurance in part on the basis of sales solicitations that allegedly "failed to disclose that the solicitation was intended to propose insurance . . . . 11 (Id. ¶ 31-32.) These allegations place the Coulters, as individuals, within the settlement class certified by this Court.

Timing of Intervention Motions

20. Before the former sales managers and the Coulters filed their intervention motions on May 12 and 23, respectively, plaintiffs and MetLife had already entered into a settlement

agreement, and this Court had preliminarily approved that agreement as sufficiently reasonable, adequate and fair to warrant notice to members of the settlement class. Following entry of the Court's April 22, 1994 Order granting preliminary approval, individual notice and claim forms were mailed to approximately 71,000 potential settlement class members, and notice was published in newspapers and magazines with a combined circulation in excess of 7 million. (Docket No. 144, 149.)

CONCLUSIONS OF LAW

Intervention as of Right

21. Absent an express statutory right to intervene (which the would-be intervenors do not assert), an applicant may not intervene as of right under Fed. R. Civ. P. 24(a) (2) unless:

> (1) the application to intervene is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to

the suit.

ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (Ilth Cir. 1990).

22. An applicant must meet all four criteria to intervene under Rule 24(a)(2). Id.; accord Washington Elec. Cooip.. Inc. v. Massachusetts mun. wholesale Else. Co., 922 F.2d 92, 96 (2d Cir. 1990). The Court has considered each of the four factors as follows.

The Coulters

42. The Court next considers the four Rule 24(a)(2) requirements in connection with the Coulters' motion to intervene.

43. **Interest and Impairment of Interest:** Because the Coulters are settlement class members, they have a legally protectable interest in the subject of this action. This Court's April 22, 1994 Order, however, allowed the Coulters -- and any other dissatisfied Pennsylvania residents within the settlement class -- to opt out of the settlement class and litigate elsewhere if they chose to do SO. Thus, the Coulters and other Pennsylvania

residents cannot claim that the disposition of this action would unduly impede or impair their interests if intervention were denied. See, e.g., Roberts v. Heim, [1989] Fed. Sec. L. Rep. (CCH) 1 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same).

44. In the alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. See Fed. R. Civ- P. 23(c)(2)(c). The Coulters appeared through their own attorney at the fairness hearing.

45. As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights. See, e. g., Webcor Elec. Inc. v. Whiting, 101 F.R.D. 461, 466 (D. Del.

1984) (denying intervention to shareholders because they could object at fairness hearing); Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 901, 829-30 (N.D. Cal. 1979) (denying intervention to class members who had opportunity to object at fairness hearing), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Alaniz v. California Processors, Inc., 73 F.R.D. 289, 295 (N.D. Cal. 1976), aff'd sub nom. Alaniz v. Tillie Louis Foods, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).

46. **Adequacy of Presentation:** The Court also rejects the Coulters' argument that plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles.

47. Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in this action and that Rule 23(a)'s requirements of commonality,

typicality and adequacy of representation are not satisfied as to the putative subclass they allege. These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements "may be more easily satisfied in the settlement context than in the more complex litigation context." Dalkon Shield Claimants Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.), 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989); see also Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157-58 (S.D. Ohio 1992).

48. Timeliness: The Court questions whether the Coulters' intervention motion is timely under the factors articulated in Reeves, 754 F.2d at 968-69. The Coulters filed their Pennsylvania action on or about March 25, 1994; they therefore knew of their claims before that date. Moreover, in light of the extensive national publicity that this case and MetLife's sales solicitations received, the Coulters quite likely knew or should have known about this action when they filed their Pennsylvania suit. Yet the Coulters did not move to

intervene here until May 23 -- well after the Court had preliminarily approved the proposed settlement and individual notice had been mailed to potential settlement class.

49. The Court need not decide, however, whether the Coulters' intervention motion was timely because the motion fails to satisfy two of the other four Rule 24(a)(2) requirements: impairment of interest and inadequacy of representation. As discussed above, a prospective intervenor must meet all four of those requirements to intervene as of right. ManaSota-88, Inc., 896 F.2d at 1321; accord Washington Elec. Coop., Inc., 922 F.2d at 96. In addition, denial of intervention would in no way prejudice the Coulters because (i) they had an opportunity to exclude themselves from the settlement class or object to the proposed settlement and (ii) they actually entered an appearance in this case.

50. The Court therefore concludes that the Coulters cannot intervene as of right because they have not met Rule 24(a)(2)'s requirements. Moreover, their motion is defective for several other reasons.

51. Asserted Right to Represent Other Pennsylvania Residents: The Coulters' attempt to exclude all Pennsylvania residents from the settlement class is improper. Just as the Coulters had the right to participate in or opt Out of the settlement class, so did every other settlement class member who resides in Pennsylvania. The Coulters have no authority unilaterally to make that decision for all other Pennsylvania settlement class members. See 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 16.16 at 16-90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel") (emphasis added). The type of group or mass opt-out that the Coulters seek therefore is improper -- especially where so many Pennsylvania residents already have filed claim forms expressing their desire to participate in the proposed settlement. See, e. g., Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on an individual basis, and noting that "a mass opting out . . .

clearly would be disruptive to the district court's ongoing settlement management").

52. The Coulters' attempt to "sever" or exclude all Pennsylvania residents from the settlement class also is particularly inappropriate because the Coulters have not been determined to be adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege or to force the putative subclass members' withdrawal from the settlement class certified in this action.

53. Due Process: The Coulters' claim that this Court's application of Florida law to Pennsylvania residents would violate due process is unfounded. The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement -- an issue controlled by federal law governing

settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of law principles. In addition, if the Coulters and other Pennsylvania residents believed that Pennsylvania law gave them a greater potential recovery than would be available to other settlement class members, they could have excluded themselves from the settlement class.

54. **Procedural Defect**: Intervention also is denied because the Coulters did not attach a pleading as required by Rule 24(c) "setting forth the claim or defense for which intervention is sought." The failure to attach a pleading is especially significant here because the Coulters do not even attempt to assert a claim or defense; rather, they seek to intervene so they can "sever" themselves and all other Pennsylvania residents from the case.

Permissive Intervention

55. Where an applicant may not intervene as of right under Rule 24(a)(2), the Court nevertheless has discretion to

permit intervention under Rule 24(b)(2) if the application is timely and if

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2); see, e.g., ManaScota-88, Inc., 896 F.2d at 1323.

56. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." Worlds, 929 F.2d at 595 (quotations omitted).

The Coulters

64. As discussed above, the Coulters' intervention motion might be untimely. But more importantly, the procedures adopted by the Court for potential class members to object or exclude themselves from the settlement class already offer the Coulters all the relief they seek for themselves and

other Pennsylvania settlement class members. granting permissive intervention thus would serve no purpose where the would-be intervenors wish only to "sever" themselves from the action and already have the right to do so. (As discussed above, however, the Coulters' unilateral attempt to "sever" other Pennsylvania settlement class members is improper.)

In Tampa, Florida, on October 25th, 1994.

/s/
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CIVIL ACTION NO. 93-1849-CIV-T-23A

SHERRY HORTON — PLAINTIFFS
1732 Cone Street
Toledo, OH 43606

JOYCE ARMBRUSTER
Oakwood Drive
Largo, FL 34640

VS.

METROPOLITAN LIFE INSURANCE COMPANY
DEFENDANTS
SERVE: Stuart Nagler
An Officer and managing Agent One Madison Avenue
New York, NY 10010

RICK URSO
2826 Morrison Avenue
Tampa, FL 33609

INTERVENOR'S (PENNSYLVANIA COULTER CLASS') MOTION FOR INTERVENTION

Pursuant to Fed.R.Civ.P. 24, Ronald and Anissa Coulter, representatives of the class of Pennsylvania residents (Intervenors) similarly injured by the Metropolitan Life Insurance Company's (hereinafter MetLife) insurance practices,

respectfully requests that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. if the Court does not permit severance, in the alternative, the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

1. Ronald and Anissa Coulter are Pennsylvania residents who purchased a "50/50 Savings Plan" in Pennsylvania from a MetLife agent based in Butler, Pennsylvania. The 50/50 Savings Plan" was allegedly a retirement plan with a life insurance component. In reality, it was whole life, life insurance.

2. The "50/50 Savings Plan", as it was presented and sold to consumers in Pennsylvania, was never presented to the Pennsylvania insurance Department, and accordingly was not approved by the Pennsylvania Insurance Department.

3. The "50/50 Savings Plan" did not contain disclosure language to the effect that the plan, because it was comprised

only of whole life insurance, was not an investment or savings plan.

4. Disclosure language stating that life insurance is not an investment or savings plan is required by the Pennsylvania Insurance Department. 40 Pennsylvania Statute section 277; 40 Pennsylvania Statute section 472.

5. The Pennsylvania Insurance Department specifically undertook an investigation of MetLife's sales practices in Pennsylvania and issued a lengthy and detailed report of its findings. See Report of Market Conduct Examination of the Metropolitan Life Insurance Company, December 23, 1993, at pp. 3839; 58; 71-72; 96-97; 155-160 (exhibit 1). The Insurance Department's effort in this regard is unequivocal evidence of its concern that Pennsylvania residents be protected from the fraudulent insurance practices detailed in the Report.[3]

3

The Coulters respectfully request that this Court take judicial notice of the Pennsylvania Insurance Department's Report and will provide a copy of the Report in its entirety if the Court so desires.

6. The Coulters, as representatives of all those persons similarly injured in Pennsylvania, brought a class action suit in state court, pursuant to statutory and common law of Pennsylvania (see Amended Coulter Complaint, exhibit 2), on behalf of Pennsylvania citizens injured by MetLife's failure to have the life insurance Policies Properly approved by the Pennsylvania Insurance Department Prior to selling the same, as well as MetLife's failure to effectuate disclosure as is required by the Pennsylvania Insurance Department and other fraudulent insurance practices. (See exhibit 1, at pp. 155-160.)

7. The Pennsylvania Consumer Protection Law allows for a private cause of action against insurance companies and sets forth that it is a violation to sell or represent that a good or service has approval which it does not have.

8. The Coulter Class, complaint also includes a sub-class of Pennsylvania residents who purchased MetLife life insurance which MetLife agents represent ad to be a retirement or savings plan with a life insurance component, which is also an alleged

violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law("CPL"). 73 Pennsylvania Statute 201-2, as well as the Pennsylvania Unfair Insurance Practices Act, 40 Pennsylvania Statute section 277, and is a violation of the Pennsylvania Bad Faith Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371.

9. Ronald and Anissa Coulter also filed a Class Action Complaint in the Court of Common Pleas of Allegheny County, on May 18, 1994, against individual defendants Michael George, former MetLife Training Director, and Gary Antonino, former MetLife Regional Vice-President, who formulated the "50/50 Savings Plan" scheme in Pennsylvania. The Class in that case is comprised of Pennsylvania residents who purchased MetLife life insurance, which, at the direction of Michael George and Gary Antonino, was represented by MetLife agents to be a retirement or savings plan with a life insurance component. This misrepresentation is an alleged violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pennsylvania Statute section 201-2; the Pennsylvania Bad Faith

Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371; and the Pennsylvania Insurance Department Act, 40 Pennsylvania Statutes section 277. The claims in class action against Michael George and Gary Antonino are based upon the identical transactions and occurrences as in the earlier filed class action.

10. The Coulter Class and sub-class members, all of whom executed contracts of insurance in Pennsylvania and were injured in Pennsylvania, are entitled to the application of Pennsylvania law to their causes of action. Any practice to the contrary is a denial of due process to the Coulter class and sub-class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In Phillips Petroleum, the United States Supreme Court declared that the application of Kansas law in a class action to claims which did not arise in Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits". Id. at 822.

11. Representative Coulter is a steel worker. The remainder of the class is constituted of those who purchased retirement plans with a life insurance component from MetLife and is not

limited to any particular profession or occupation.

12. In contrast, the Horton class action represents "primarily . . . licensed nurses . . . [and other health care professionals]" (Horton Class Action Complaint, 4/22/94, at pph. 19), who purchased MetLife life insurance which they each believed to a retirement or savings plan as a result of MetLife's agents' representations. (Horton Class Action Complaint at pph. 8.)

13. The Coulter class and sub-class seek relief on the basis of the Pennsylvania CPL, 73 Pennsylvania Statute section 201-1 et seq., the Pennsylvania Bad Faith Insurance Law, 42 Pennsylvania Code Statutes Annotated section 8371, and Pennsylvania fraud and contract law.

14. The Pennsylvania CPL empowers the Pennsylvania Attorney General to adopt such rules and regulations as may be necessary to protect Pennsylvania residents from fraud and unfair or deceptive business practices. A Pennsylvania purchaser of goods, such as each member of the Coulter class, also has a private right of action under the Pennsylvania CPL.

15. The Coulter Class and sub-class, by virtue of their

claims for relief pursuant to the Pennsylvania CPL and Bad Faith Insurance statute, have claims atypical of those of the Horton class as well as the class of any other state.

16. The Coulter Class became aware of the pending Horton class action and settlement agreement, and the Horton Class' attempt to encompass the Coulter Class when several Coulter Class members received opt-out notices on or about May 5, 1994.

17. The settlement reached between the Horton Class and MetLife is the product of the claims and defenses available under Florida law and does not adequately protect or serve the rights, interests and/or defenses of contracting parties in Pennsylvania, specifically, the Coulter Class.

18. For example, the Pennsylvania Insurance Department has already ordered the relief which was ordered in the Horton Class settlement, i.e., restitution of premiums paid as a result of MetLife's fraudulent business practices. See Order of Deputy Insurance Commissioner for Pennsylvania Insurance Department,, 2/11/94, (exhibit 3). Enforcing the settlement

agreement with regard to the Coulter Class is a clear abridgement of the class, rights to seek additional damages which are available under Pennsylvania law.

19. Accordingly, the proposed Horton Class Settlement agreement does not adequately protect the Coulter Class' rights and is therefore not in the best interests of the Coulter Class.

20. The Coulter Class has a right to intervene pursuant to Fed.R.Civ.P. 24 (a) (2), on the grounds that the Horton Class settlement may impair the Coulter Class from obtaining the relief to which it is entitled under Pennsylvania statutory and common law. The Coulter Class requests permissive intervention, pursuant to Fed.R.Civ.P. 24 (b) (2), because the Coulter Class' claims share a common question of law or fact with those advanced by the Horton Class; specifically, the fraudulent sales practices of MetLife.

21. The Horton Class action is founded upon Federal and Florida state RICO, breach of fiduciary duty and common law fraud Claims.

22. The allegations contained in the Horton Complaint and

Amended Complaint are dissimilar from the Coulter Class' claims against MetLife. The Horton Complaints purport to contain allegations common to all class members. However, they do not represent and/or contradict the Coulter Class, claims because:

1. the Horton class claims that the MetLife agents in Florida identified themselves to class members "nurse's representatives", Horton Complaint para. 4 (a); whereas Representative Coulter is a steel worker, and never, in the process of purchasing MetLife insurance, did he speak with anyone claiming to be a "steel workers representative"; in addition, the Coulter Class is not limited to any one profession or group;

2. that MetLife agents never referred to life insurance as such, but called it an "investment", Id. at para. 4(d); and that MetLife agents never disclosed that the product being purchased was life insurance, Id. at para. 8; in contrast, MetLife Account Representatives in Pennsylvania stated that the "50/50 plan" had a life insurance "component";

3. that MetLife agents perpetrated interstate wire and mail

fraud on the class; Id. at para. 23 (a) and (b); and that Florida RICO applies to the claims of the class, Id. at pares. 28-35; where the Coulter Class, claims are limited to events which occurred in Pennsylvania;

4. that a Florida agent's (Urso's) actions are common to all class members, Id. at para. 40; where the Coulter Class' claims are based on the representations and/or omissions made only by Pennsylvania Account Representatives and officers;

5. erroneously alleges federal RICO in connection with the class, insurance claims, contradictory to the McCarran-Ferguson Act which dictates that states should regulate their respective insurance industries and that federal causes of action are not applicable, Id. at paras. 20-27; but the Coulter Class has not alleged MetLife RICO violations in connection with its claims.

23. The requirement of Fed.R.Civ.P. 23 (a) (2) that there be "questions of law or fact common to the class" is not satisfied by the Horton Class representative.

24. The requirement of Fed.R.Civ.P. 23 (a) (3) that "the claims or defenses of the representative parties are typical of the

claims or defenses of the class" is not satisfied by the Horton Class representative.

25. The requirement of Fed.R.Civ.P. 23 (a) (4) that "the representative parties will fairly and adequately protect the interests of the class" is not satisfied by the Horton Class representative because the remedies available under Pennsylvania statutes and common law are not available to the Horton Class representative.

WHEREFORE, the plaintiffs respectfully request that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. If the Court does not permit severance, in the alternative the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

Respectfully submitted,

/S/_____

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CERTIFICATE OF SERVICE

I, Kenneth R. Behrend, hereby certify that a true and correct copy of the within Brief in Support of Plaintiffs, Motion for intervention was served this 20th day of May, 1994, upon the following by United States mail, first class postage prepaid addressed as follows:

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EXHIBIT 1

Excessive FIP ratios were noted for MetLife offices not identified by audit reports.

FINDINGS AND CONCLUSIONS

From analysis of MetLife consumer complaints, audit reports and FIP reports, it was clear management failed to utilize or integrate available internal control mechanisms to detect and control improper replacement activity.

-The impact of improper replacement activity upon complaint data, i.e. increased complaints, would not be expected to occur until such time as new policies failed to perform as solicited. Thus current complaints would not be expected to accurately mirror improper replacement activity as indicated by FIP ratios contemporary to complaints.

-MetLife complaint ratios, due to Replacement and Misrepresentation, of 75.98%, 81.03% and 72.80% in years 1990, 1991 and 1992 (see page 13) should have been cause for MetLife management to have examined those issues and to have scrutinized current audit and FIP reports.

-Access of MetLife corporate management to those reporting

vehicles indicates corporate managements awareness of replacement and misrepresentation as practices existing within the marketing strategy.

-other than audit reports, no MetLife corporate directives specifically identified replacement and misrepresentation issues requiring correction, within Pennsylvania.

-A December 16, 1992 letter by Richard N. Maurer, senior Vice President, Career Agency Operations of MetLife, directed to the MetLife field force, entitled "Honesty and Integrity: our Basis For Doing Business", reiterated MetLife's position requiring honest and ethical business conduct, indicating an awareness and concern of corporate MetLife as to practices of the field force.

-Sales representatives informed customers that existing policies were to be left in place until policy anniversary, and not immediately surrendered, in order to earn dividends.

-Insureds were instructed to disregard MetLife annual premium or lapse notices, which were explained by MetLife sales representatives as computer errors.

-MetLife checks for values taken from existing policies were routed through consumer homes in attempts to conceal replacement activity in conjunction with the sale of a new policy.

-Policies were not countersigned or dated at delivery in three (3) of the six (6) cited cases. Where delivered policies had been countersigned and dated at delivery, two (2) of the three (3) cases showed untimely delivery.

-FINDINGS AND CONCLUSIONS-

The observed pattern of deceptive solicitations and concealed replacements by MetLife sales representatives appears to have been for the purpose of increasing their commissions. Replacement solicitations were such as to cause policyholders, directly or indirectly, to believe that by using their existing policy values to purchase new insurance they were to receive paid-up policies, free coverage, or increased coverage at little or no additional cost.

Supporting the cover letter which accompanied the delivered policy were two (2) pages, one captioned "Individual Retirement

Benefit (I.R.B.) v.s. Individual Retirement Account (I.R.A.) Certificate of Deposit (C.D.)" and the other captioned "Metropolitan Investment Program". The captioned pages represented the Life to 95 policy as an "investment" and a "savings" program. It was falsely stated there was no "penalty for early withdrawal" and that the I.R.B. provided a 119 to 12-t Long Term Rate of Return". MetLife subsequently informed the Insurance Department that based upon the current values, as of December 1992, the policy would require additional premium payments for eight (8) years in order to reach a point where it would become self-supporting.

FINDINGS AND CONCLUSIONS

The Unfair Insurance Practices Act, No. 205, Section 5(a)(1)(vi) defines "Unfair Methods of Competition" and "Unfair or Deceptive Acts or Practices" as 11... Making, publishing, issuing or circulating any estimate, illustration, circular, statement, sales presentation, omission comparison which:" ... Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of

any insurance policy".

Section 637 of The Insurance Department Act prohibits misrepresentation of terms of policy and future dividends by agents, brokers, or solicitors. "No agent or solicitor of any insurance company, association, or exchange, and no insurance broker, shall issue, circulate, or use, or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, association, or exchange, or make an estimate, with intent to deceive, of the future dividends payable under such policy.,,

The referenced examples clearly demonstrate the noted pattern of sales practices and procedures used by MetLife sales representatives in utilizing sales illustrations based upon non-guaranteed projected values, and in many cases reinforcing the sales illustration values with cover letters containing misleading statements concerning the insurance policy being sold. approval, and that only the Tax Advantaged Bonus Plan for Nurses had penetrated into the Pennsylvania marketplace.

MetLife had allegedly recalled and destroyed all unapproved issues of the advertising. The MetLife corporate advertising was found consistent with other questioned advertising, in that it promoted the sale of whole life policies of insurance through solicitations promising earnings for retirement. While containing footnoted disclosure information, the various advertising pieces possessed a capacity, through stating precise earning values, to deceive consumers as to future earnings. Further, sales solicitation scripts employed by telemarketers clearly avoided the presentation of the Tax Advantaged Bonus Plan as insurance. The Tax Advantaged Bonus Plan was found to have evolved from 1991 to 1993 through the backing of MetLife Senior Vice President Richard N. Maurer and was, in fact, termed alternatively "The Maurer Plan". Charles M. Kavitsky, Territorial officer In Charge and Vice President, Mideastern Territory, was found to have coordinated and provided telemarketing support to MetLife sales representatives J. Joel Sherman, Richard Antonino, and Ronald Schram in Western Pennsylvania for the Tax Advantaged Bonus Plan.

-FINDINGS AND CONCLUSIONS-

Although the examination could not identify in detail the full extent of market penetration gained by MetLife through use of the various retirement/savings/investment plan solicitations, testimony of consumers and MetLife agents contacted during the examination indicated the misleading solicitation methods were used routinely to solicit Whole Life, Life to 95, and Life to 98 policies sold by MetLife. It is clear the various forms of advertising developed and used by MetLife sales representatives were designed to preclude proper disclosure of insurance sales to Pennsylvania consumers. It was also noted, while the focus of the examination was an a six (6) county Western Pennsylvania Region, the various marketing schemes and practices occurred throughout Pennsylvania.

X. FORMS FILING AND APPROVAL

Throughout the course of the examination, it was noted MetLife policies viewed in consumer homes, policy copies sent into the Department in response to mail surveys, and specimen policies provided by MetLife's Johnstown office differed from

the corresponding MetLife policy forms which were approved by, and on file with, the Department.

Whole Life Policy (7-87) and Life to 95 (57-87): Form approval was granted by the Department for both policy forms on June 2, 1987. Departmental approval was granted to MetLife for replacement of policy pages seven (7) and eight (8) for both forms on June 12, 1991. The approved replacement pages provided consumers notice that; "You may ask us to pay premiums with a combination of yearly dividends, the cash value to any paid-up additions and/or any dividend accumulations. As long as these values are great enough, out-of-pocket premiums need not be paid to keep your policy in force." All policy forms 57-87 and 7-87 encountered during the examination, issued subsequent to June 12, 1991, contained the earlier pages which had been replaced with the pages approved June 12, 1991.

Upon subsequent review by MetLife, it was reported to the Department a total of seventy thousand five hundred fifty-seven (70,557) incorrect Whole Life Policy (7-87) forms and ten thousand three hundred eighty-one (10,381 Life to 95

(57-87) policy forms had been issued to Pennsylvania consumers. As a result, these two (2) unapproved policy versions were issued to a total of eighty thousand nine hundred thirty-eight (80,938) consumers subsequent to June 12, 1991.

Survivorship Whole Life Policy (2J-90 PA):

Form approval was granted by the Department for this policy form on October 23, 1990. MetLife had initially submitted a generic policy form 2J-90 which was disapproved by the Department. Resubmission was made in the form of 2J-90 PA, which included revisions to pages one (1) and nine (9), from what was originally filed under form 2J-90, concerning Supplemental Insurance Benefit and Split Policy Option. Based upon the revisions, policy form 2J-90 PA was then approved. However, all Survivorship Whole Life policies (2J-90 PA) noted during the examination contained the original page one (1) contained in policy 2J-90 which was not approved for use in Pennsylvania.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighty-three (383)

unapproved versions of Survivorship Whole Life policy 2J-90 PA, containing the unapproved language on page one (1), had been issued to Pennsylvania consumers subsequent to October 23, 1990.

Flexible Premium Life Insurance Policy (7UL-90): Form approval was granted by the Department for this policy form on August 23, 1990. The initial MetLife submission was disapproved. Among the points of disapproval was the use of disclosure language on the Policy Specification page stating "The Planned Premium shown below may need to be increased to keep this policy and coverage in force." The Department required additional disclosure language "Even if coverage continues, the amount payable on the final date of policy nay have little or no value.", be added to the disclosure language submitted on the Specification Page in order to be considered for approval. MetLife subsequently submitted an amended Policy Specification page with the requested disclosure language, and Departmental approval was granted August 23, 1990.

All Flexible Premium Life Policies (7UL-90) noted during the

examination contained the limited, unapproved, disclosure language on the Policy Specification page and lacked the disclosure language required to obtain approval of the policy. This is of serious concern to the Department since it was noted throughout the examination the Flexible Premium Life Policy (9UL-90) was the primary policy sold using the "free insurance" and "paid-up insurance" solicitations. The absence of the required disclosure notice to policyholders, denied consumers full and fair disclosure concerning future premium payments and policy value. The lack of proper disclosure was found to be particularly serious in terms of damage to consumers in view of the manner in which the policies were solicited and sold.

Upon subsequent review by MetLife, it was reported to the Department a total of twenty nine thousand eight hundred forty-two (29,842) Flexible Premium Life Policies (7UL-90) were issued to Pennsylvania consumers with unapproved and incomplete disclosure language.

Multifunded Flexible Premium Life Policy (7.6FM-90): Both unisex and sex distinct versions of this policy were granted

Departmental approval on November 6, 1990. It was noted throughout the examination policy form 7.6FM-90, as actually issued to consumers, contained additional unapproved policy language on pages 1, 3, 3.1, and 5.

Upon subsequent review by MetLife, it was reported to the Department a total of six thousand five hundred forty-two (6,542) unapproved versions of the Multifunded Flexible Premium Life Policy (76.FM-90) were issued to Pennsylvania consumers subsequent to November 6, 1990.

Throughout the course of the examination, all policy forms noted in consumer homes, as well as duplicate policies provided by MetLife, at the Department's request, contained non-guaranteed illustrated value tables bound in with the policy pages. Since only guaranteed value tables are permitted to be included in a bound policy, each policy containing the non-guaranteed illustrated value tables constitutes an unapproved version of the policy.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighteen thousand eight

hundred forty-two (318,842) policies were issued to Pennsylvania consumers containing unapproved non-guaranteed illustrated value tables. According to MetLife, this occurred with all life and annuity policies issued from the Johnstown, Pennsylvania office since 1988.

- FINDINGS AND CONCLUSIONS -

In summation of the above findings, a total of four hundred thirty-six thousand five hundred forty-seven (436,547) unapproved policy forms were issued to Pennsylvania consumers. Section 354 of the Insurance Company Law (40 P.S.477b) specifically states it shall be unlawful for any insurance company doing business in the Commonwealth of Pennsylvania to issue, sell, or dispose of any policy or contract covering life insurance or annuities until the forms have been submitted to and formally approved by the Insurance Commissioner.

It should be noted that during the course of the examination MetLife cooperated fully in providing the Insurance

Department with all requested documents, and beginning inquiries into the various consumer complaints which surfaced during the examination in order to determine necessary corrective action required to make damaged consumers whole.